Former students of Professor Brewster will remember him for his broad interests, his geniality, and kindness. As a teacher of law, he was remarkable in his clearness of thought and expression. Members of the student editorial board of this Review during the period covered by his editorship, who came into much closer contact with him than did the student body generally, owe him a great deal for his stimulating personality and scholarship.

PRICE REGULATION UNDER THE POLICE POWER.—A recent Indiana law providing for the regulation of prices at which all coal moving in intra-state commerce in the state may be sold, has just received the sanction of the District Court of the United States for the District of Indiana.[1] The case arose upon a bill of complaint filed by one of the operating companies to enjoin the commission created by the Act from entering upon any of its duties. Several aspects of the bill were deemed by the court to be premature but the vital point in controversy was adjudicated, namely, as to whether or not the state has any power at all to regulate profits arising from the industry. In denying the injunction and dismissing the bill the court added one more to the already large number of "businesses affected with the public interest" of which phrase the Supreme Court of the United States has said, "We can best explain by examples."[2] Inasmuch as the opinion was rendered by a court consisting of two circuit judges and one district judge it would seem to be entitled to almost if not quite as much weight as though rendered by a Circuit Court of Appeals.

The phrase "business affected with the public interest" was first used in this country in an opinion delivered by Chief Justice Waite in the case of *Munn* v. *Illinois*,[3] decided in 1876, holding that the business of storing grain in elevators was so affected and is there quoted from an old treatise[4] of Lord Chief Justice Hale. As applied in that and succeeding cases it has seemed to mean no more than this, that there are certain classes of businesses which may be regulated by the state to a greater extent than others to which the term "purely private" has been applied. No precise test has so far been laid down by the Supreme Court by means of which the limits of these two classes can be distinguished. The attitude thus far steadfastly adhered to by the Court may be illustrated by the following quotation from its most important recent decision upon the point, *German Alliance Insurance Co.* v. *Lewis*.[5] After reviewing at length the cases following *Munn* v. *Illinois, supra,* the court commented upon the group as a whole as follows: "The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. * * * 'The underlying principle is that business of certain kinds holds such a peculiar

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[1] *American Coal Mining Co.* v. *The Special Coal and Food Commission of Indiana, et al,* ——— Fed. ——— (Sept. 6, 1920).

[2] *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389.

[3] 94 U. S. 113.

[4] DE PORTIBUS MARIS, 1 HARG. L. T. R. 78.

[5] 233 U. S. 389.

relation to the public interest that there is superinduced upon it the right of public regulation.'" In order to arrive at a conclusion, as to the nature of this "peculiar relation," which will constitute a basis for formulating a reliable test as to when it exists, it is important to review briefly the historical development of governmental price regulation.

Businesses of all descriptions were regulated during the Middle Ages and later during our own colonial period and in the early years following the formation of the constitution with scarcely a thought as to the basis upon which the power of regulation rested, certainly without the existence of the power being questioned. The assizes of longbows, books and beer barrels during the reigns of Henry the Seventh and Henry the Eighth, and the various Statutes of Laborers are not unfamiliar nor are the colonial statutes regulating interest on money, wages, bread, ferriage, mill tolls, wharfage and various other services and commodities.[6] One suggestion may be gleaned from a study of this mass of regulation which sheds some light upon the modern regulatory tendencies and upon the nature or the peculiar relation already referred to. For the most part regulation, even in the Middle Ages, extended only to necessities of life and this because competition as a protection for the consumer was inadequate and distrusted.[7] The subsequent development of competition as an active force resulted in the *laissez-faire* policy of economics particularly characteristic of the first half of our national existence[8] and regulatory statutes ceased because there was no need for them. Logically, therefore, it would seem that should competition again become inadequate the natural consequence would be the reappearance of regulatory statutes in order to supplement it. During the inactive interim, however, the absence of these statutes became so universally accepted that their reappearance raised a question as to the power of the state to enact them, a power which was once unquestioned. Accordingly the necessity arose of protecting the public where it is deemed necessary without revolutionizing the social order. The court proceeded to meet this necessity in *Munn* v. *Illinois, supra,* with the phrase "business affected with the public interest." Businesses so affected are subject to the control of the state to the extent that the returns derived from their pursuit can be limited. Businesses not so affected may be regulated in other ways where their conduct affects health or safety for instance, but their profits may not be directly curtailed.

The contribution of the Middle Ages then is this: That where competition is inadequate to protect the consumer against extortion in securing the necessities of life, there is precedent for governmental intervention and the "peculiar relation" may be said to exist. It remains to be determined whether the modern instances in which regulation has been upheld have actually given effect to this old principle without acknowledgement.

Although the doctrine of "business affected with the public interest" was launched in *Munn* v. *Illinois* and was the real basis for the decision, there

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[6] 3 HEN. VII, Cap. 13; 25 HEN. VIII, Cap. 15; 35 HEN. VIII, Cap. 8; MASS. REV. LAWS 1648; FREUND ON POLICE POWER, p. 382.

[7] ROGERS, SIX CENTURIES OF WORK AND WAGES, p. 139.

[8] 28 HARV. L. REV. 84.

was much in the opinion in that case that gave aid and comfort to the opponents of any and all government regulation. The element of monopoly was stressed and a certain vague analogy to the common carrier suggested so that it seemed possible to confine the "anomaly" within comparatively narrow limits. In *Budd* v. *New York*,[9] another grain elevator case, the doctrine was affirmed without extension. In *Brass* v. *North Dakota*,[10] which followed, however, the reactionaries who sought to check the development of the doctrine should have been slightly disillusioned. This case has been frequently cited as modifying *Munn* v. *Illinois* to the extent of holding the monopolistic feature unnecessary. The following language, quoted from the opinion, discloses that this conclusion is slightly inaccurate although the result is perhaps the same. "When it is once admitted, as it is admitted here, that it is competent for the legislative power to control the business of elevating and storing grain, whether carried on by individuals, or associations, in cities of one size and in some circumstances, it follows that such power may be legally asserted over the same business when carried on in smaller cities and in other circumstances. It may be conceded that that would not be wise legislation which provided regulations in every case and overlooked differences in the facts that call for regulation, but as we have no right to revise the wisdom or expediency of the law in question, so we would not be justified in imputing an improper exercise of discretion to the legislature of North Dakota." The case may be cited, however, as the beginning of the end for all attempts to limit the doctrine by artificial distinctions.

Munn v. *Illinois* contains the first of a series of dissenting opinions which has been continued in all of its successors, each striving to repudiate or at least to limit the doctrine advanced, by means of distinctions which the majority of the court have consistently disregarded. It has been maintained that it is necessary that the property be devoted to a public use, that there be some public grant or franchise or some analogy to the innkeeper or carrier or some right upon the part of the public to demand service. In the opinion rendered in the case of *German Ailiance Insurance Co.* v. *Lewis* in which the business of fire insurance was held to be affected with the public interest the repudiation of the artificial distinctions which was begun in the *Brass* case was conclusively effected. The court admits that cases can be cited which support the attempted distinctions but says further: "The distinction is artificial. It is indeed but the assertion that the cited examples embrace all cases of public interest. The complainants explicitly so contend, urging that the test that applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which necessarily, it is contended, can only apply to property and not to personal contracts. The distinction, we think, has no basis in principle, (*Noble State Bank* v. *Haskell*, 219 U. S. 104); nor has the other contention that the service which cannot be demanded cannot be regulated."

The artificial distinction having been finally cast aside in the case last

[9] 143 U. S. 517.

[10] 153 U. S. 391.

cited the court proceeded to leave the phrase "business affected with the public interest" unrestricted except for the various examples which were given, but made no progress toward a definition of any sort. So far as previous indications are to be relied upon, therefore, from the point of view of the Supreme Court, the principal case will merely add another to the list of businesses so effected and the court will presumably continue on its way with no attempt to clarify the underlying principle upon which the doctrine rests, or to provide a reliable test in accordance with which the fate of future exercises of the regulatory power may be determined in advance. The district court, however, in the principal case attacked the question with more temerity and suggested what seems to be a reliable test, besides illuminating considerably the basis upon which regulatory power rests.

The court recognizes the old artificial distinctions to a certain extent by dividing all examples of regulation into two classes, one of which includes all public utilities and all cases in which there is a public franchise involved or a public service performed; the other, a number of apparently unrelated cases in which none of these elements appear. It is obvious that the real difficulty in defining the phrase "business affected with the public interest" is encountered in attempting to find a common basis upon which cases of the latter class may be said to rest since the public nature of the first class has long been conceded to be a sufficient basis for regulation. The court finds the basis for the regulation of the second class in the "power of the people to restrict the theretofore existing circle in which a person had his life and the one within which he had his property, to bring these down narrower on account of the conditions that were found to be oppressive to the people." In other words, underlying all these cases there is a common characteristic, namely, that by virtue of economic conditions or whatnot certain businesses have been placed in an advantageous position enabling those engaged in their pursuit to oppress the public, and the latter is not without remedy. In the latter class the court placed married women surety laws, usury statutes despite the historical explanation, and the coal industry under its present circumstances. Having set up the two classes the court says that when the same evil is found to exist in both classes, inasmuch as the regulation in both cases is based upon the same police power, the same remedy should be applied and that since regulation of prices has long been the known remedy for preventing extortion in the first class it should be applied to the same evil when it is found to exist in the second class.

The possibility of reconciling all cases of regulation upon the basis of the relation of the industries involved to the possibility of oppression was suggested by Freund[11] several years ago and seems to achieve all that the district court achieved by dividing the instances of regulation into two classes. It is true that the public utilities, for instance, are affected with the public interest because they have received public franchises. They are also affected with the public interest in the same manner that the coal industry is so affected in that they ordinarily occupy a position of economic advantage

[11] FREUND, POLICE POWER, p. 388.

which they can use to oppress the public. Possessing the same advantage without the public franchises, if that were possible, the utilities would still be affected with the public interest in the same manner as the second class of cases set up by the court. As Freund[12] suggests upon the theory of the necessity of businesses bearing a relation to the possibility of oppression in order that they may be regulated it is possible on the one hand to account for existing legislation without conceding legislative power with regard to any and all commodities which may be selected, and on the other hand to allow for new applications of this power. If this relation to the possibility of oppression is an acceptable test, there remains a single awkward question as to the court's right of review where the legislature has in effect declared the oppression to exist.

The effectiveness of the test suggested by Freund and the District Court of Indiana can best be determined by its application to new instances of the exercise of the police power which have not been passed upon by the Supreme Court. Such an instance is the recent Montana law undertaking to regulate prices of commodities of all descriptions "from coal to diamonds, from the babe's first swaddling clothes to the corpse's shroud." The law was passed upon by the District Court of Montana in *Holter Hardware Co.* v. *Boyle*[13] and was held to be unconstitutional upon the ground that many purely private businesses were included within its scope, the court admitting, however, that "businesses affected with a public interest" were a proper subject of regulation. The court made no attempt to draw a line between the two sorts of businesses, but said in effect merely that the legislature had gone too far. It is obvious that two factors are essential in order to enable those engaged in any particular business to oppress the public. In the first place, the industry must involve a necessity of life or at least a product of great importance to the welfare of the community, and in the second place competition in the industry must be inadequate to protect the consumer. Otherwise regulation is useless and undesirable. It will be noted that these same characteristics were the basis of most of the regulation of the Middle Ages. It is also clear that no declaration of the legislature can force these characteristics upon any business in which they are wholly lacking. The attitude of the courts toward the finding of facts by the legislature as indicated in the passage of a regulatory act has been said to be that of an appellate court toward a finding by the jury. If there are any facts at all to support the decision it will not be disturbed. In the light of the test suggested therefore, the distinction between the Indiana and Montana laws is clear and the decision in each case may be supported. It is a matter of common knowledge that both of the characteristics necessary to afford the opportunity for oppression are present in the coal industry today. It is a prime necessity of life and at present there is a shortage of supply. Therefore the "peculiar relation" exists. The business is "affected with the public interest." On the other hand, the scope of the Montana law obviously includes a number of commodities which

[12] FREUND, POLICE POWER, p. 388.
[13] 263 Fed. 134.

can in no way conceivable under present economic conditions become instruments for oppression,—weapons with which their wielders can "bludgeon the public." As the Supreme Court has repeatedly said, however, businesses which are today purely private may tomorrow, through a now inconceivable change of conditions, enter the "public interest" class.

Inasmuch as the Supreme Court has steadily extended the scope of the phrase "business affected with the public interest" without committing itself to any definition or test it is perhaps unlikely that it will now alter this policy. Nevertheless, the test suggested by Freund and by the district court in the Indiana case seems logical, fits all applications of the power which have been sanctioned by the Supreme Court and seems both enlightening and reassuring as to the extent to which the doctrine will be carried. A. W. B.

APPEALS BY THE STATE IN CRIMINAL CASES.—Many state constitutions provide that no one shall be placed twice in jeopardy for the same offense. Hence, after an acquittal by a jury the State cannot prosecute an appeal for the purpose of securing a reversal. But an appeal ordinarily serves two very distinct purposes. It not only questions the correctness of the judgment below as a basis for affirming or reversing it, but it operates as a means for enabling the higher court to lay down rules of decision to be followed in subsequent cases. This is the characteristic common law method for the development of the law, and unless cases can be appealed the law can never be authoritatively expounded. To secure this exceedingly important result in criminal cases many States have by statute provided for appeals by the State for the sole purpose of determining questions of law.

It is quite obvious that when such an appeal is taken on a question of law after a verdict of not guilty, the decision of the appellate court can have no direct effect in that case. The double function normally performed by an appeal changes to the single function of declaring the law without affecting the question of present liability.

Now this opens an excellent opportunity for a technical attack on the validity of the whole proceeding. Every new step in legal administration has to run the gauntlet of that considerable number of judges who are instinctively inclined to consider novelty and unconstitutionality as synonymous terms. The statute under discussion calls for a decision in a case no longer pending in the full and ordinary sense. The controversy between the parties, so far as it is to be determined and fixed by the judgment, is entirely over. The presence or absence of error is an academic question in that particular case. Why, then, should a court bother itself further? Why not stop the whole proceeding and refuse to take any chance of committing the judicial impropriety of passing on a "moot" case?

In *State* v. *Allen* (Kan., 1920) 191 Pac. 476, this question is quite vigorously argued on both sides. But the reactionary element was in the minority, and the State of Kansas has placed itself in the list of States which recognize that courts can serve the people in new ways and still survive. The minority opinion is an excellent example of that extreme judicial conservatism so familiar to the student of legal history, though curiously enough it